No. 06-1050

In The
Supreme Court of the United States

LISA BURKE, MICHAEL CARPER, Individually and on Behalf of All Others Similarly Situated,

Petitioners,

v.

UTAH TRANSIT AUTHORITY, JOHN INGLISH, Individually, LOCAL 382 OF THE AMALGAMATED TRANSIT UNION and the UNITED STATES DEPARTMENT OF LABOR,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

BRIEF IN OPPOSITION OF RESPONDENT LOCAL 382 OF THE AMALGAMATED TRANSIT UNION

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BRIEF IN OPPOSITION OF RESPONDENT LOCAL 382 OF THE AMALGAMATED TRANSIT UNION

The Respondent Local 382 of the Amalgamated Transit Union ("Local 382") respectfully requests this Court deny the petition for writ of certiorari seeking review of the opinion of the United States Court of Appeals of the Tenth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals is reported as *Burke v. Utah Transit Authority,* 462 F.3d 1253 (10th Cir. 2006). The order denying the timely petition for rehearing en banc is reprinted in the appendix to the petition as Appendix A, pp. 1a-2a. The orders of the trial court of the United States Court for the District of Utah (District Judge Paul G. Cassell) were not reported. They are reprinted in the appendix to the petition as Appendices C, D, and G, pp. 24a-39a, 44a-53a.

JURISDICTION

The judgment of the United States Court of Appeals for the Tenth Circuit was entered on September 1, 2006 affirming the decision of the lower court. The court of appeals denied a timely petition for rehearing en banc on November 6, 2006. The jurisdiction of this court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Section 13(c) of the Urban Mass Transportation Act of 1964, 49 U.S.C. § 5333(b), provides, in pertinent part, as follows:

> (1) As a condition of financial assistance . . . , the interests of employees affected by the assistance shall be protected under arrangements the Secretary of Labor concludes are fair and equitable . . .
>
> (2) Arrangements . . . shall include provisions that may be necessary for –
>
> (A) the preservation of rights, privileges, and benefits (including continuation of pension rights and benefits) under existing collective bargaining agreements or otherwise;
>
> (B) the continuation of collective bargaining rights;
>
> (C) the protection of individual employees against a worsening of their positions related to employment . . .

Utah Code Ann. § 17A-2-1031 provides as follows:

> Employees of any public transit system established and operated by the district shall have the right to self-organization, to form, join, or assist labor organizations and to bargain collectively through representatives of their own choosing provided, however, that such employees and labor organizations shall not have the right to join in any strike against such public transit system. The district shall recognize and bargain exclusively with any labor organization representing a majority of its employees in an appropriate unit with respect to wages, salaries, hours, working

conditions, and welfare and pension and retirement provisions, and, upon reaching agreement with such labor organization, to enter into and execute a written contract incorporating therein the agreements so reached.

STATEMENT OF THE CASE

Local 382 incorporates the description of the facts and history of this case as set forth in the opinion of the Court of Appeals for the Tenth Circuit. Local 382 desires to correct the following possible misstatements contained in the petition.

1. Although the initial complaint in this case was titled as a "class action", the Petitioners never sought nor received class certification from the trial court or the court of appeals. The Petitioners only represent themselves in this case.

2. Throughout this case, the Petitioners have referred to Local 382 as a "company union" or a "union endorsed" by Respondent Utah Transit Authority ("UTA"). Except for the unsubstantiated assertions of the Petitioners, there is no evidence in the record to support such characterizations of Local 382.

3. In the petition, it is alleged that Local 382 argued that "the NLRA does not protect individual rights". Local 382 never made such an argument. In fact, Local 382 argued that the NLRA "is to maximize collective rights of the employees but [also] to give due deference to individuals . . . "

4. In the petition, it is stated that the court of appeals ignored "the First Amendment issues despite being fully briefed". As will be discussed below, these issues were not briefed on appeal.

REASONS WHY THE PETITION SHOULD BE DENIED

The petition should be denied because it is not of sufficient import to warrant further consideration. A unanimous panel of the court of appeals gave full consideration to the issues and decided them correctly. The decision of the Court of Appeal for the Tenth Circuit does not conflict with decisions of other circuit courts of appeal. Further, the decision correctly applied federal court procedural rules.

I. THE DECISION OF UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT DOES NOT CONFLICT WITH DECISIONS OF OTHER COURTS OF APPEALS

The petition highlights two decisions which Petitioners allege conflict with the rulings in this case. First is *Amalgamated Transit Union v. Donovan*, 767 F.2d 939 (D.C. Cir. 1985). The *Donovan* case involves the interpretation of Section 13(c) of the Urban Mass Transit Act. Second is *Texas State Teachers Assn. v. Garland Independent School Dist.*, 777 F.2d 1046 (5th Cir. 1985). The *Garland* case involved the First Amendment rights of public school teachers to communicate at school with other teachers regarding union issues. These two cases are discussed separately below.

A. The decision in this case is consistent with *Donovan*.

The Petitioners rely upon the *Donovan* case for two separate, but related, legal propositions. First, the Petitioners assert that *Donovan* substantiates their direct legal challenge to the certification of the labor arrangements between Local 382 and the UTA, under Section 13(c) of the Urban Mass Transportation Act ("UMTA"), to be fair and equitable, by the Respondent United States Department of Labor ("DOL"). Second, the Petitioners argue that *Donovan* requires that federal law, as articulated in the National Labor Relations Act, 29 U.S.C. § 151 et seq. ("NLRA"), and as refined by decisions of the National Labor Relations Board and federal courts, must be used when interpreting the phase "an appropriate unit" as codified in Utah law. The Utah law is quoted above and is found at Utah Code Ann. § 17A-2-1031. As will be discussed separately below, the Petitioners have misinterpreted *Donovan*.

1. *Donovan* does not support the claim against DOL.

The Petitioners appropriately assert that *Donovan* held that, should the DOL incorrectly certify a labor arrangement under Section 13(c) of the UMTA as fair and equitable, then that certification can be challenged in federal court. In this case, the court of appeals, however, rightly held that, based upon the entire record and the law, the certification by the DOL, which occurred in October, 2001, was correct. The only rationale advanced by Petitioners, that the DOL certification was incorrect, is that the system-wide bargaining unit with the UTA is an inappropriate unit as a matter of law. This argument has

been the gravamen of Petitioners' case from the start. Every time this argument has been made to the courts, the courts have correctly rejected it. As will be discussed below, this Court should also reject this argument by denying this petition for writ of certiorari.

2. *Donovan* does not require the use of federal law to interpret Utah law.

The *Donovan* case and this Court's opinion in *Jackson Transit Authority v. Local Division 1285, Amalgamated Transit Union,* 457 U.S. 15 (1982), are the seminal case interpreting the relationship between Section 13(c) of the UMTA and state labor law for its public transit employees. Nothing in the *Burke* opinion conflicts with *Donovan.* In fact, the *Burke* opinion honors *Donovan.*

One of the most significant statements contained in *Donovan* is as follows:

> In sum, Congress struck a delicate balance in section 13(c). The statute provides that state law should govern the labor relations of public transit authorities and their employees, but it conditions federal transit aid, in part, on the continuation of collective bargaining rights. In setting out those rights, Congress chose not to incorporate the entire structure and requirements of the NLRA into section 13(c), for to do so would force states to choose between federal transit aid and their exclusion from the coverage of the NLRA. On the other hand, Congress made it clear that federal labor policy would dictate the substantive meaning of collective bargaining for purposes of section 13(c). "Good faith" bargaining, to a point of impasse if necessary, over wages, hours and other terms and conditions of

> employment has always been the essence of federally-defined collective bargaining rights; indeed, excluding the federal sector, it is the almost universally recognized definition of collective bargaining in the United States.

767 F.2d 938, 950-951.

The *Burke* court, in the insightful footnote 2, refers to the above quoted statement with the following:

> We doubt federal labor doctrine even applies here. The National Labor Relations Act (NLRA) does not govern this dispute because state law and a state agency are involved, and accretion as well as severance are merely procedural tools used by the National Labor Relations Board to judge whether a bargaining unit satisfies the standards set forth in NLRA. *See* 29 U.S.C. § 152(2); Utah Code Ann. § 34-20-2(5); *see also Jackson Transit Auth.*, 457 U.S. at 27-29 (noting that § 13(c) does not supercede state law and leaves intact the exclusion of local government employers from NLRA); *see generally* Robert A. Gorman & Matthew W. Finkin, *Labor Law* § 5.2 (2d ed. 2004). While Congress clearly intended "that federal labor policy would dictate the substantive meaning of collective bargaining for purposes of [UMTA]," *Donovan*, 767 F.2d at 950, it "did not intend to subject local government employers to the precise structures of the NLRA." Id. at 949. To the contrary, Congress made a reasoned decision to incorporate only the most fundamental substantive tenets of federal labor policy.
>
> Consequently, we are skeptical of analyzing the plain language of § 17A-2-1031 through this framework. Neither the plain language of the

> statute requires it, nor does the legislative intent behind the statute suggest it. Section 17A-2-1031 was enacted to meet the requirements of UMTA and to ensure the receipt of federal aid for Utah's public transportation system. If UMTA does not require analysis of these doctrines, then neither should § 17A-2-1031.

462 F.3d 1253, 1260.

The court of appeals clearly recognized that Utah law is result oriented. Utah does not have a sophisticated system of governance of public employee labor relations. Utah has no "little labor relations board" as exists in some states such as California and New York. Under our federal system, as codified in Section 13(c) of the UMTA, it is the right of the State of Utah to adopt the simple, results oriented labor policy for its transit employees as articulated in Section 17A-2-1031, Utah Code Annotated, so long as that policy does not violate "the most fundamental substantial tenets of federal labor policy".

The Petitioners have been unable to point to anything that would substantiate that a system-wide bargaining unit at a public transit company violates federal labor policy, let alone the most fundamental substantial tenets of federal labor policy. The Petitioners' arguments have always centered upon a misinterpretation of the doctrines of accretion and severance as developed by the National Labor Relations Board and federal courts under the NLRA. Even though, as pointed out in the above quoted footnote 2, the district court and the court of appeals were not obligated by federal law or state law to utilize a NLRA framework to interpret the phase "an appropriate unit" as found in Utah statute, both courts did engage in such an analysis.

The court of appeals carefully reviewed the district court's analysis of the federal labor law doctrines of accretion and severance and held, in part, as follows:

> These factors and the undisputed facts clearly support the district court's grant of summary judgment. The majority of TRAX employees, including the appellants [Petitioners], transferred from the bus unit. An "established stable bargaining relationship" has existed between Local 382 and the consolidated unit since 1999. Local 382 has been the bargaining representative for UTA and its predecessors and, consequently has represented all mass transit workers in Utah, since 1904. Finally, industry practice is to consolidate mass transit employees into a single bargaining unit.

462 F.3d 1253, 1262.

With their argument, the Petitioners advance a misinterpretation of federal labor law and then attempt to impose that misinterpretation upon Utah labor law. As the *Burke* opinion correctly held, *Donovan* does not support Petitioners' conclusion.

B. The decision in this case is consistent with *Garland*.

With this petition for writ of certiorari, it is argued for the first time on appeal that the Petitioners' First Amendment free speech rights were violated by the UTA. As a basis for this argument, the Petitioners cite to the *Garland* case, a decision which was never cited by any party to this case until this petition, despite the fact that the *Garland* opinion was rendered by the Court of Appeals for the Fifth Circuit in 1985.

Before the district court, the Petitioners aggressively argued that their First Amendment rights have been violated by the UTA. This Court's decision in *Perry Education Association v. Perry Local Educators' Association*, 460 U.S. 37 (1983), was argued by the parties and cited by the district court as a reason why the Petitioners' rights had not been violated. On appeal to the court of appeals, the Petitioners filed two docketing statements, two opening briefs, three reply briefs, and a petition for rehearing. In not a single one of these documents did the Petitioners mention *Perry* or *Garland*. Additionally, in those eight documents, there were only brief, single sentence references to Petitioners' First Amendment rights being violated.

This Court will not review issues on writ of certiorari which were not raised in the court of appeals. *Delta Airlines, Inc. v. August*, 450 U.S. 346, 362 (1981). A review of the filings before the court of appeals in this matter demonstrate that any First Amendment issues raised by the *Perry* case and the *Garland* case were not brought to the attention of the court of appeals.

Even though the issues involving the First Amendment were neither briefed nor argued before the court of appeals, that court's decision was perfectly consistent with the *Garland* opinion. In *Garland*, a teachers union brought suit against a school district claiming that the district's policies, which restricted communication between teachers regarding "employee organizations", violated the First Amendment rights of the teachers. The court of appeals held, because of the guidelines established by this court in *Perry*, that the union's First Amendment rights were not violated by the district policies, but that the policies which deny "teachers the right to discuss . . .

[Union or Union] business during non-class time are unconstitutional". 777 F.2d 1046, 1055.

There is no competent evidence in the record that the Petitioners were denied, by any policy of the UTA, the right to discuss and communicate with other employees of the UTA matters involving employment, union or anti-union views on non-UTA time. The only evidence present was that the Petitioners were prevented from posting notices on a bulletin board on UTA property which had been expressly reserved for the use of Local 382, pursuant to a collective bargaining agreement between the UTA and the Local. This is the very subject discussed by this Court in *Perry*.

Had the Petitioners raised the *Garland* opinion with their appeal, the Court of Appeals for the Tenth Circuit would have held, consistent with *Perry* and *Garland,* that Petitioner's First Amendment rights had not been violated.

II. THE DISTRICT COURT APPROPRIATELY GRANTED SUMMARY JUDGMENT

With both their appeal and this petition for writ of certiorari, the Petitioners have argued that the district court inappropriately granted the UTA's motion for summary judgment. In the petition, two central themes are advanced in support of Petitioner's argument. First, they argue that the burden of proof in this case was improperly shifted by the district court to the Petitioners in the granting of the summary judgment. Second, the Petitioners claim that they have not had sufficient time to conduct discovery prior to the district court hearing the UTA's

motion for summary judgment. These two points will be addressed separately below.

A. The District Court did not shift the burden of proof.

Under the Utah law quoted above, it is the Petitioners' burden to prove that the system-wide bargaining unit between the UTA and Local 382 is inappropriate. The Petitioners have attempted to shift the burden of proof to the Respondents requiring the Respondents to prove that the bargaining unit was appropriate. As demonstrated above, the Petitioners' argument fails for two reasons. First, it incorrectly assumes that federal labor law applies to the Utah statute. Second, the Petitioners fail to correctly articulate the federal labor law doctrines of accretion and severance.

The record in this case is filled with undisputed material facts, which taken together, support the correct legal conclusions that, under Utah law, the system-wide bargaining unit between UTA and Local 382 is appropriate. The Petitioners have been unable to point, either before the district court, the court of appeals, or this court, to a single disputed material fact which would support the conclusion that the system-wide bargaining unit is inappropriate.

B. Petitioners had sufficient time to conduct necessary discovery.

During the prosecution of this case, when the district court was scheduling matters, the Petitioners did not raise any objections that they did not have sufficient time to conduct discovery. It was not until after the Petitioners

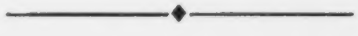
filed a motion for preliminary injunction, filed a second motion for preliminary injunction, responded to a motion to dismiss, and filed their own motion for partial summary judgment, that the Petitioners alleged they needed more time to conduct discovery. The Petitioners made the request by filing a Rule 56(f) motion.

The court of appeals correctly ruled that the district court did not abuse its discretion by denying the Petitioners' Rule 56(f) motion because the three "disputed" issues of fact highlighted by Petitioners in their motion were not material as to whether or not the system-wide bargaining unit between the UTA and Local 382 was appropriate under Utah law. This court, in *Celotex Corp. v. Catrett,* 477 U.S. 317 (1986), made the following observation:

> . . . no serious claim can be made that respondent was in any sense "railroaded" by a premature motion for summary judgment. Any potential problem with such premature motions can be adequately dealt with under Rule 56(f), which allows a summary judgment motion to be denied, or the hearing on the motion to be continued, if the nonmoving party has not had an opportunity to make full discovery.

477 U.S. 317, 326. This observation could apply to the case at hand. The Petitioners choose not to conduct discovery; instead they choose to proceed immediately with motions. When given the opportunity to explain why additional discovery would be necessary, the Petitioners could not point to any disputed issues of material fact.

The district court correctly granted the UTA's motion for summary judgment.



CONCLUSION

For the foregoing reasons, Respondent Local 382 of the Amalgamated Transit Union requests this Court deny the petition for a writ of certiorari.

Respectfully submitted,

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